

**A New Castle City Board of Adjustment Hearing took place on March 3, 2011 at 7 p.m. in the City of New Castle's Town Hall.**

Present: John F. Klingmeyer, Mayor  
Daniel Losco, City Solicitor  
David Athey, City Engineer

City Personnel: Jeff Bergstrom, City Code Official

Mayor Klingmeyer called the meeting to order at 7:30 p.m.

The Mayor read the Notice of Public Hearing that states, "An application has been filed by Delmarva Investment Group, LLC, 1501 Elm Street, Stanton, DE 19804, for a variance from certain provisions in the New Castle Zoning Code to permit 4 dwelling units at the property located at 1011 Wilmington Road, New Castle, DE, parcel number 21-007.00-200. (The property presently has 3 dwelling units.) Variances requested are for an area variance for the property to contain 4 dwelling units; an area variance to allow the density of the development to remain as it currently exists; a front yard setback variance and a side yard variance on the northern side of the Wilmington Road house; a front yard and rear yard variance for the 11<sup>th</sup> Street structure to remain in its current location, and; a parking variance to allow for 2 on-street parking spaces.

For the purpose of considering this application, the Board of Adjustment will hold a Public Hearing on Thursday, March 3, 2011, at 7 p.m. in Old Town Hall, 2<sup>nd</sup> Floor, located at 2<sup>nd</sup> and Delaware Streets, New Castle, Delaware."

An affidavit of publication was published in the News Journal and the New Castle Weekly on 2/16/11. Mr. Bergstrom testified the property has been properly posted.

Mr. Brian Murray presented. Mr. Murray is serving as attorney for the Delmarva Investment Group LLC as well as members Jim Fulton and Dr. Art Long who is out of town. The property in question is 1011 Wilmington Road. There are two (2) structures on this property as shown on the survey and according to New Castle County (NCC) records both structures were built in 1930. There are no external additions to the property. Originally the structure facing Wilmington Road was used as two (2) units; one upstairs and one on the lower floor. An ice cream shop occupied the lower unit with a residence on the second floor. When the ice cream shop closed the owner continued to live on the first floor and rented out the second floor unit. At all times this structure was used as a two-unit structure. Using the structure as two (2) separate units stopped when Delmarva Investment Group, LLC purchased the property in 2010.

There are special conditions associated with this property primarily due to its age. The only thing that has changed is the property to the right of 1011 Wilmington Road (lots 118 & 117) has been subdivided to another owner creating an off-street parking issue for the 1011 Wilmington Road property. There is a two-story structure housing a beauty parlor on the first floor and an apartment on the second floor. They believe these buildings have remained in place since being built which pre-date the City's zoning code. A lot line is the only thing that moved. They believe this also creates a special condition for these properties.

If the zoning code were applied to the properties the buildings would need to be moved from their location.

*(Mr. James Fulton was sworn in by the Mayor.)*

Mr. Murray indicated he had a letter from William Lehane, former owner of this property, stating that there was an ice cream parlor on the first floor and an apartment on the second floor. When the ice cream parlor closed the first and second floors were used as living quarters. The residence in the back facing 11st Street has always been used as two (2) living residences. When Mr. Fulton's group purchased the property there was a seller's disclosure that was completed indicating that the seller does currently occupy the property.

Mr. Fulton wanted the tenants to leave the units before purchasing them. Mr. Athey asked if you can get from the first floor to the second floor without going outside. Mr. Fulton said "yes." *(Drawings of the present configuration of the first and second floors and what is being proposed were shown to the Board.)* They plan on adding a wall at the entrance that will necessitate two (2) separate entrances; one for the upstairs unit and one for the downstairs unit. The two (2) units shared a kitchen on the first floor in the past but a separate kitchen will be installed on the second floor. There is a washer and dryer on the first and second floors and hook-ups available in the basement. There will be minor construction on the outside (windows, siding) and a new walkway will be constructed in the front. They received a curb-cut permit from DelDOT to install a parking area (56' deep X 19' wide) on the left side of the Wilmington Road structure. That parking area has been established and will be connected to a proposed walkway (30' X about 15') to the front of the house. There is an existing walkway that runs along the parking area to the new rear door of the house. The parking area allows for six (6) spaces.

*(Discussion about the history of the property followed.)*

Mr. Losco recognizes that the zoning is R1, single family home, and this property is a non-conforming use pre-existing the zoning code, but multi-family is an R2 use. He questioned Mr. Murray why the applicant is seeking an area variance and not a use variance. Mr. Murray said that use variances cannot be granted under the City zoning code to his understanding. They are requesting minor adjustments to density and adjustments to parking, notwithstanding the parking area they have already constructed.

Mr. Losco said the applicant wants to convert a single dwelling house, one kitchen, that was not a two dwelling building. Mr. Fulton said that kitchens define a dwelling. Mayor Klingmeyer said the building has always been a single-family residence.

Mr. Murray offered the applicant has not caused most of the special circumstances that they are asking to remedy tonight. They are requesting changing a single unit into two (2) units. They have eased parking issues with the addition of the parking area. The rear building has two (2) garages and two (2) on-street parking spaces so there are no issues with it.

Mr. Athey quoted Section 230-57(C)(3), "under no circumstances shall the Board of Adjustment grant a variance to allow a use not permissible under the terms of this chapter." Mr. Fulton reiterate that nothing is changing on the exterior. He maintains his properties and boasts a 100% occupancy rate and has a good working relationship with the NCC. He has letters from neighbors around his property in support of his plans. Having a viable six (6) bedroom house can present problems with the tenants. *(He cited problems that can be associated with a house of this size.)* He purchased the property in December 2010.

Mr. Athey noted the building was a two (2) unit dwelling with an ice cream shop on the bottom floor and living area on the second floor. It was converted before the modern zoning code was established in approximately 1976. He asked if this was a two (2) unit structure prior to the zoning code in which case all we would be doing by granting a variance is legitimizing it, or do we look at it as it merged into one unit sometime after that zoning code and today.

Mr. Fulton was asked if the building has two (2) electric meters and he responded "no" but two (2) electric meters will be installed for the structure.

Mr. Fulton informed that he is attempting to buy another property nearby. He has a reputation of converting structures to make the neighborhood better.

Mr. Bergstrom said the use of the property is residential whether it is one story or two story; the building use is R3. The Board of Adjustment must decide a variance for zoning density. Mr. Fulton said they have no desire to make the property commercial.

Mr. Losco questioned if the building on 11<sup>th</sup> Street has always been a two (2) unit structure, predating the modern zoning code. Mr. Murray confirmed it has always been two (2) units; it has been rehabilitated. Mr. Bergstrom testified that the structure on Wilmington Road is in poor condition.

Mr. Athey noted that Section 230-16(A) specifies what can be put in an R1 zone. The following "uses" are permitted as a matter of right; 1. A single family detached dwelling. It is an interpretation issue and "use" is not defined in the front of the chapter. He interprets the City's definition of "use" is not necessarily residential but in this case a single-family detached dwelling. He interprets the City's definition in the code as not residential but single family residential, detached residential. He deferred to Mr. Losco for his legal interpretation. Mr. Losco will provide his interpretation later in the hearing.

Mr. Murphy does not believe that granting a variance in this matter conveys any special privilege on the applicant. There are multi-family uses in the area. *(He cited some of the properties.)* Concerning parking, the 11<sup>th</sup> street buildings have two (2) on-street parking spots for each unit so they are not adding anything to the parking situation. They are easing the situation with the addition of the driveway off Wilmington Road that handles up to six (6) vehicles. He offered that Mr. Bergstrom is familiar with the improvements that Mr. Fulton and his company have done in the area in the past. It is difficult to get tenants for large houses and it is also difficult for the landlord to monitor. Having two (2) quality units in the building will allow for less usage of the property and fewer problems. The age of the building and development of area properties along with interpretation of the code as it is would require the building be moved, which is not possible. The lot is triangular in shape making its configuration odd. The applicant did not cause these circumstances to exist; they were in existence when he bought the property. For all of the reasons stated, they request that the variance be granted.

Mr. Fulton added that the installation of the driveway aids the off-street restriction on 1011. He believes the subdivision took place in the 1970s just before Mr. Lehane passed away.

Mayor Klingmeyer asked Mr. Bergstrom if the building was legal prior to the subdivision. He said it would have been a non-conforming lot because it had multiple buildings, one two (2)

family and the other something else. Mr. Fulton added that when the subdivision was done it created the problem for 1011 Wilmington Road. He wants to work with the community and make every effort to make it a win-win for all parties. Renting out a two (2) bedroom unit is more manageable than trying to rent a house with 5-6 bedrooms again citing the difficulties involved with monitoring.

Mr. Losco wanted to confirm that assuming there is a legitimate use on Wilmington Road as it stands, there isn't the need for the other area variances because there is the non-conforming status issue. Mr. Murray confirmed that is the case.

Mr. Fulton testified that the area of the lot is .225 acres. Mr. Athey referred to Mr. Murray's letter that requests the density of development to remain as it is. The bulk regulation table at the end of the zoning code does not have a density column but does have a minimum lot size of 7,500 square feet. That means for four (4) units, 30,000 square feet would be needed which is larger than .225 acres.

Mr. Athey questioned Mr. Murray's letter stating an initial request was made as a use variance. Mr. Murray responded that an initial application of a use variance was filed but were informed it needed to be an area variance. Mr. Bergstrom clarified they applied for a special exception. Mr. Athey is struggling with the words "use" versus "area." This body cannot create a non-conforming use. Mr. Bergstrom said this is not a special exception adding that the property already has two (2) family home lots and it was non-conforming when the zoning code was created. He stated it is legitimate to have two (2) family lots but is unsure if it is legitimate to add another two (2) family use. The City zones properties, not structures. Mr. Losco noted there is one (1) lot and that when you have a non-conforming use it can continue but cannot be expanded. He continued that the non-conformity is the two (2) unit dwelling on 11<sup>th</sup> Street. It can't be turned into a three (3) unit dwelling. If the Washington Avenue property had been continuously used prior to the zoning code as a separate two (2) unit dwelling, that could continue. But there is no evidence supporting the fact it was a two (2) unit dwelling prior to the adoption of the zoning code.

Mr. Fulton has testified to what he was told by the former owner, Mr. Lehané. That is, when it was first purchased there was an ice cream parlor on the first floor and they lived on the second floor and used the kitchen on the first floor also. The ice cream parlor closed, likely prior to the modern zoning code, and has been used as a boarding house with tenants living on the first and second floors. This represents a code violation. Mayor Klingmeyer recalls the original building being where the family lived, and then an addition was added in the front for the retail business. The front section is not part of the original structure.

Mr. Fulton testified the building was first used as a single-family home before Mr. Lehané owned it. He used it as a single-family dwelling as well with use of a commercial site on the first floor and living space on the second floor all on one (1) parcel. When the subdivision lines were drawn the problems with the set-back requirements were created. Converting it to two (2) apartments from a single-family home would be beneficial to all parties.

Mr. Losco asked Mr. Bergstrom if the surrounding properties are zoned R1 and he said "yes" even though the property across the street and next to it and the back of this one are non-conforming. Mr. Fulton questioned Mr. Bergstrom on the uses of various properties near the

subject property. He understands the zoning issue affecting his property but believes other residents in the area have not complied accordingly.

Mr. Losco asked Mr. Murray if he looked at Section 230-57(d) concerning structural alterations resulting in enlargement or extension of a non-conforming structure. It is a different application from an area variance but may fit this situation better. He has not.

It appears to be a fair characterization that if the applicant sought a variance as to the structural alteration they would not have the use issue to deal with. *(A more close reading of this section would be necessary.)* It is a different type of application that requires notification by regular mail of every property owner within 300 feet. That is not normally done for an area or use variance.

The Board reviewed other portions of Section 230-57 to determine if something more appropriate is in the code.

There are two (2) structures on this property and Mr. Losco believes they must be considered as a whole on the property. Two (2) structures combined are a non-conformity. The Board then discussed the definition of language in Section 230-57. Mr. Athey inquired if the use goes with the property or the structure.

*(Mr. Mike Paraskewich, professional engineer working with Mr. Fulton, was sworn in by Mayor Klingmeyer.)*

Regarding the reduction of use, Mr. Paraskewich testified the boarding house is seen as a higher use than a single-family dwelling. If it existed as a non-conforming use before then logically it would be taking a step down by having two (2) individual apartments.

The Board further discussed Section 230-57 and certain language contained therein. Mr. Bergstrom stated the application is straight forward. It doesn't seek to expand to put a fourth unit on the property.

Mr. Athey raised a point of order. If the applicant wishes to apply for a different use does the Board need to vote this application down resulting in the applicant paying another fee to return to us or can we simply reopen later. Mr. Losco informed the Board of Adjustment has the power to amend the existing application. But because of the special notice requirements it would need to be re-noticed informing of the continuance noting the proper section of the zoning code.

A continuance is necessary because the application is being amended meaning the public notice will change. The public must be properly notified and given the opportunity to support or not support the amended application.

Mr. Fulton said the notices that were sent out were to turn this building into a two (2) unit building. Mr. Losco said the property was posted in the newspaper, no property owners within 300 feet were notified in writing by the City. That is what the code requires of the City in this particular expansion of non-conforming use application. Section 230-57(d) addresses structural alterations.

Mr. Athey raised another point of order to determine whether all of the set-back variances are still required. Mr. Losco said they would still need to request those variances in order to legitimize the whole property.

*(A 5 minute recess took place to allow the applicant and his counsel to discuss a continuation.)*

Mayor Klingmeyer called the hearing back to order at 8:50 p.m.

Mr. Murray informed that the applicant would like to amend the application to include the request for variance under Section 230-57(d) asking for the enlargement of a non-conforming use.

**Mr. Losco made a motion that the request to amend the application be granted and that the hearing be continued to a later date so the public can be properly noticed. Mr. Athey seconded the motion. (The Mayor questioned how much notice is required for the public and Mr. Losco said that is determined by City administration.) The motion was approved by unanimous vote.**

Mr. Fulton asked if anything else is required of him for the continued hearing. He was advised to study the subject section of the code carefully and establish the timeline for when things actually happened (as best as possible) for the record. The age of the building would also be helpful.

A motion was made by Mr. Losco requesting an amendment to the application

The hearing was adjourned at 8:50 p.m.

Respectfully submitted,

Debbie Turner

Debbie Turner  
Stenographer